Obama Administration Takes First Step to Rescind Harmful Regulation that Jeopardizes Women’s Access to Reproductive Health Care

The Obama Administration has initiated the process to rescind a harmful regulation issued by the Department of Health and Human Services – one of the infamous ‘midnight regulations’- that became effective on the last day of the Bush Administration. The HHS regulation threatens to dramatically undermine access to a broad range of health information and services by essentially allowing health care workers and institutions an unfettered ability to refuse to provide health care services, information, and referrals that offend their religious beliefs or moral convictions. The regulation fails to balance patient needs against the desire of health care workers to refuse to provide services by upending the notion of informed consent and creating confusion in situations where the health and well-being of patients should be the top priority. It also threatens unduly harsh penalties, and is sure to sow confusion because it is vague, broad in scope, and fails to acknowledge any interactions with existing federal and state employment laws. In finalizing the regulation, the Bush Administration ignored an avalanche of comments from Congress, the medical, legal, and women’s communities – and the government’s own Equal Opportunity Employment Commission—urging that the rule be abandoned.

The HHS regulation offers an interpretation of three existing federal laws (known as the Weldon federal refusal law, the Church amendments, the Coats amendment) which give individuals and institutions the ability to refuse to provide abortion or sterilization services based on religious or moral objections. HHS published the regulatory change on December 19, 2008, and it became effective January 20, 2009. Recipients of federal funds subject to the rule must fill out forms certifying compliance prior to October 1, 2009.

On January 15, 2009, three lawsuits were filed in U.S. District Court in Connecticut asking the court to block the controversial regulation. Connecticut Attorney General Richard Blumenthal filed suit on behalf of his state and six others (California, Illinois, Massachusetts, New Jersey, Oregon and Rhode Island), alleging that the regulation is too vague and overbroad and conflicts with other federal and state laws. The Planned Parenthood Federation of America filed a second suit on behalf of its affiliates, while the American Civil Liberties Union filed sued on behalf of the National Family Planning and Reproductive Health Association, which represents providers of publicly funded family planning services.

The proposed rule to rescind the HHS refusal regulation is being reviewed by the Office of Management and Budget (OMB) and will likely be published in the next few days. It is expected that the rule will call for the standard 30-day comment period seeking public input.

Politically-Motivated Refusal Regulation Is a Solution in Search of a Problem
In issuing the provider refusal regulation, the Bush Administration claimed to be addressing concerns that intolerance toward health care professionals with certain religious beliefs was discouraging some from entering health care professions. In response, the regulation broadly interpreted three provisions of existing federal law (known as the Church, Coats, and Weldon amendments after their Congressional sponsors) that have long allowed providers in federally funded clinics and other medical providers to refuse to provide abortion or sterilization services if it clashes with his or her beliefs. The new regulation requires most recipients of federal health funds to provide written certification of compliance with all three statutes.

Refusal Regulation Undermines Access to Birth Control and State Laws that Expand Access to Contraception

The refusal regulation expressly declines to define abortion, noting that “questions over the nature of abortion and the ending of a life are highly controversial and strongly debated.” As such, individuals, hospitals, pharmacies, insurance plans and other affected entities seemingly are free to act on their belief that contraception is tantamount to abortion. This lack of clarity complicates the administration of family planning services and counseling available to low income women at Title X clinics or paid for by the Medicaid program. It is difficult to see how such programs could operate if they had to employ staff who objected to providing birth control services.

Similarly, the regulation will impact enforcement of the myriad state laws promoting greater access to contraception including, those requiring insurance plans that provide prescription drug coverage to include coverage of contraception; laws requiring pharmacies to fill valid medical prescriptions; and laws that require hospitals to offer emergency contraception to rape survivors.

Regulation Expands “Who” Can Deny Services

Current law allows medical providers and federally funded clinics to refuse to provide abortion or sterilization services if doing so clashes with their beliefs. These laws generally apply to health care professionals such as doctors and nurses who are directly involved with the provision of abortion or sterilization services, although some laws are written narrowly to apply only to individuals or to provider training programs. The new regulation goes much further – allowing any member of a health care institution’s workforce with a “reasonable” connection to the service to raise an objection, without ensuring that patients’ needs will in some way be met. Consequently, under the new policy, a wide variety of individuals including volunteers, clerical and janitorial staff presumably would have the right to undermine patient access to health care information and services. For example, a receptionist hired to schedule appointments in a publicly funded family planning clinic could refuse to do so for certain patients.
Refusal Regulation Undermines Access to Information about a Range of Health Care Services

The regulation broadens the types of services health care workers can refuse to provide. It defines “Assist in the Performance of” health care related tasks to include “counseling, referral, training, and other arrangements for the procedure, health service, or research activity.” As such, patients seeking care at a health care facility that receives direct or indirect funds from HHS may no longer be assured that they will even receive information about health care options, including the option of safe and legal abortion. In fact, under the new rule, providers would be under no obligation to even inform patients of their objections to providing certain services. Thus patients will have no way of knowing which services, information or referrals they have been denied.

The rule also allows health care workers to refuse to provide information and services not only for reproductive health but any medical treatment they find morally objectionable, i.e. end-of-life directives, fertility care, HIV/AIDS care, to name a few. This ambiguity raises critical issues for health care delivery in America.

Moral or Religious Objections of Health Care Workers Take Precedence Over Needs of Patients and Employers

Currently, claims of religious discrimination in the workplace are governed by an extensive body of laws, regulations and court precedent that balance the religious rights of workers with the practical needs of employers. The refusal regulation undermines federal employment law under Title VII of the Civil Rights Act, which requires an employer to reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship for the employer.

The regulation upsets the careful balance under Title VII that accommodates the religious beliefs of all employees – including health care providers – while also allowing employers to ensure that patients get the services and information they need. Title VII allows individuals to exercise religious beliefs, while recognizing that employers don’t necessarily have to hire or retain individuals if there is no way to reasonably accommodate them. In issuing the final rule, HHS wrongly asserts that Congressional intent regarding provider objections to reproductive health services was that they should be held to a “higher standard” than claims under Title VII – presumably, one that allows providers a virtually unfettered ability to opt out of activities they find objectionable.

The regulation essentially strikes no balance at all – presenting a Faustian choice for employers who must either deny patients access to services to accommodate a worker’s religious objection, or lose federal funds. The lack of any provisions addressing the practical needs of employers and patients is even more concerning because under the refusal regulation the expanded universe of individuals who can raise an objection increases opportunities to deny patients access to care and obstruct an institution’s ability to offer the very services they receive federal funding to provide.

For example, publicly funded family planning clinics receive government funds to provide contraceptive services mainly to low-income women who otherwise would lack access to such care.
Under the regulation, they would now be forced to accommodate religious objections to birth control raised by volunteers, receptionists, janitors, etc, regardless of the impact on patients and without regard to the impact on the clinic’s core mission.

**Regulation Could Impede Biomedical and Behavioral Research**

The refusal regulation could have a substantial impact on research activities at federally funded hospitals and academic, nonprofit and corporate research institutions. It prohibits a broad array of HHS-funded entities, including post-graduate physician training programs, hospitals, laboratories, universities and think tanks, from discriminating against any personnel who refuse to perform, or assist in, *any* research activity or service. Without additional guidance about how research institutions should balance the needs of their employees with the needs of their research programs — like that provided under Title VII — this regulation could adversely affect a wide range of research efforts, including federally-funded stem cell research, research involving animal testing, and research intended to help protect U.S. soldiers from biological weapons.

**Regulation is Irresponsible Public Health Policy**

This regulation was an 11th hour political ploy that put ideology ahead of public health. Supporters of the regulation claim that a climate of religious intolerance is preventing qualified individuals from entering health care professions, but HHS presented no evidence to substantiate these claims. Instead of balancing the needs of health care professionals and patients, the regulation is sure to invite confusion as well as create new barriers that prevent patients from accessing the health care services and information they need.

Policies that limit health care access are especially egregious in light of our nation’s economic and health care crisis. Millions of Americans are underinsured or have no health insurance, and 17.5 million women need publicly funded contraceptive services. Given the unmet need for basic health care services, efforts should be geared toward increasing access to health care rather than erecting additional barriers.

*February 27, 2009*